

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 35

Introduced by Howard, 9.

Read first time January 08, 2015

Committee: Banking, Commerce and Insurance

1 A BILL FOR AN ACT relating to corporations; to amend Laws 2014, LB 749,
2 section 295; and sections 21-402, 21-403, 21-404, 21-405, 21-407,
3 21-408, 21-409, 21-410, 21-412, 21-414, and 70-1903, Revised
4 Statutes Cumulative Supplement, 2014; to change the Nebraska Model
5 Business Corporation Act operative date; to change Business
6 Corporation Act references in the Nebraska Benefit Corporation Act
7 and the Rural Community-based Energy Development Act; to provide an
8 operative date; and to repeal the original sections.
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Laws 2014, LB749, section 295, is amended to read:

2 Sec. 295. This act becomes operative on January 1, 2017 ~~2016~~.

3 Sec. 2. Section 21-402, Revised Statutes Cumulative Supplement,
4 2014, is amended to read:

5 21-402 (1) The Nebraska Benefit Corporation Act applies to all
6 benefit corporations.

7 (2) The existence of a provision of the Nebraska Benefit Corporation
8 Act does not of itself create an implication that a contrary or different
9 rule of law is applicable to a business corporation that is not a benefit
10 corporation. The act does not affect a statute or rule of law that is
11 applicable to a business corporation that is not a benefit corporation.

12 (3) Except as otherwise provided in the Nebraska Benefit Corporation
13 Act, the Nebraska Model Business Corporation Act is generally applicable
14 to all benefit corporations. The specific provisions of the Nebraska
15 Benefit Corporation Act control over the general provisions of the
16 Nebraska Model Business Corporation Act. A benefit corporation may be
17 subject simultaneously to the Nebraska Benefit Corporation Act and one or
18 more other statutes that provide for the incorporation of a specific type
19 of business corporation.

20 (4) A provision of the articles of incorporation or bylaws of a
21 benefit corporation may not limit, be inconsistent with, or supersede a
22 provision of the Nebraska Benefit Corporation Act.

23 Sec. 3. Section 21-403, Revised Statutes Cumulative Supplement,
24 2014, is amended to read:

25 21-403 The following words and phrases when used in the Nebraska
26 Benefit Corporation Act have the meanings given to them in this section
27 unless the context clearly indicates otherwise:

28 (1) Benefit corporation means a business corporation:

29 (a) Which has elected to become subject to the act; and

30 (b) The status of which as a benefit corporation has not been
31 terminated;

1 (2) Benefit director means the director designated as the benefit
2 director of a benefit corporation under section 21-409;

3 (3) Benefit enforcement proceeding means any claim or action or
4 proceeding for:

5 (a) Failure of a benefit corporation to pursue or create general
6 public benefit or a specific public benefit purpose set forth in its
7 articles of incorporation; or

8 (b) Violation of any obligation, duty, or standard of conduct under
9 the act;

10 (4) Benefit officer means the officer designated as the benefit
11 officer of a benefit corporation under section 21-411;

12 (5) Business corporation means a domestic corporation as defined in
13 section ~~21-214~~ 21-2014;

14 (6) General public benefit means a material positive impact on
15 society and the environment, taken as a whole, assessed against a third-
16 party standard, from the business and operations of a benefit
17 corporation;

18 (7) Independent means having no material relationship with a benefit
19 corporation or a subsidiary of the benefit corporation. Serving as
20 benefit director or benefit officer does not make an individual not
21 independent. A material relationship between an individual and a benefit
22 corporation or any of its subsidiaries will be conclusively presumed to
23 exist if:

24 (a) The individual is, or has been within the last three years, an
25 employee other than a benefit officer of the benefit corporation or a
26 subsidiary;

27 (b) An immediate family member of the individual is, or has been
28 within the last three years, an executive officer other than a benefit
29 officer of the benefit corporation or a subsidiary; or

30 (c) There is beneficial or record ownership of five percent or more
31 of the outstanding shares of the benefit corporation, calculated as if

1 all outstanding rights to acquire equity interests in the benefit
2 corporation had been exercised, by:

3 (i) The individual; or

4 (ii) An entity:

5 (A) Of which the individual is a director, an officer, or a manager;
6 or

7 (B) In which the individual owns beneficially or of record five
8 percent or more of the outstanding equity interests, calculated as if all
9 outstanding rights to acquire equity interests in the entity had been
10 exercised;

11 (8) Minimum status vote means:

12 (a) In the case of a business corporation, in addition to any other
13 required approval or vote, the satisfaction of the following conditions:

14 (i) The shareholders of every class or series are entitled to vote
15 separately on a corporate action regardless of a limitation stated in the
16 articles of incorporation or bylaws on the voting rights of any class or
17 series; and

18 (ii) The corporate action must be approved by a vote of the
19 shareholders of each class or series entitled to cast at least two-thirds
20 of the votes that all shareholders of the class or series are entitled to
21 cast on the action; and

22 (b) In the case of a domestic entity other than a business
23 corporation, in addition to any other required approval, vote, or
24 consent, the satisfaction of the following conditions:

25 (i) The holders of every class or series of equity interests in the
26 entity that are entitled to receive a distribution of any kind from the
27 entity are entitled to vote separately on or consent to the action
28 regardless of any otherwise applicable limitation on the voting or
29 consent rights of any class or series; and

30 (ii) The action must be approved by a vote or consent of the holders
31 described in subdivision (i) of this subdivision entitled to cast at

1 least two-thirds of the votes or consents that all of those holders are
2 entitled to cast on the action;

3 (9) Publicly traded corporation means a business corporation that
4 has shares listed on a national securities exchange or traded in a market
5 maintained by one or more members of a national securities association;

6 (10) Specific public benefit includes:

7 (a) Providing low-income or underserved individuals or communities
8 with beneficial products or services;

9 (b) Promoting economic opportunity for individuals or communities
10 beyond the creation of jobs in the normal course of business;

11 (c) Protecting or restoring the environment;

12 (d) Improving human health;

13 (e) Promoting the arts, sciences, or advancement of knowledge;

14 (f) Increasing the flow of capital to entities with a purpose to
15 benefit society or the environment; and

16 (g) Conferring any other particular benefit on society or the
17 environment;

18 (11) Subsidiary means in relation to a person, an entity in which
19 the person owns beneficially or of record fifty percent or more of the
20 outstanding equity interests; and

21 (12) Third-party standard means a recognized standard for defining,
22 reporting, and assessing corporate social and environmental performance
23 that is:

24 (a) Comprehensive because it assesses the effect of the business and
25 its operations upon the interests listed in subdivisions (1)(a)(ii),
26 (iii), (iv), and (v) of section 21-408;

27 (b) Developed by an entity that is not controlled by the benefit
28 corporation;

29 (c) Credible because it is developed by an entity that both:

30 (i) Has access to necessary expertise to assess overall corporate
31 social and environmental performance; and

1 (ii) Uses a balanced multistakeholder approach to develop the
2 standard, including a reasonable public comment period; and

3 (d) Transparent because the following information is publicly
4 available:

5 (i) About the standard:

6 (A) The criteria considered when measuring the overall social and
7 environmental performance of a business; and

8 (B) The relative weightings, if any, of those criteria; and

9 (ii) About the development and revision of the standard:

10 (A) The identity of the directors, officers, material owners, and
11 governing body of the entity that developed and controls revisions to the
12 standard;

13 (B) The process by which revisions to the standard and changes to
14 the membership of the governing body are made; and

15 (C) An accounting of the revenue and sources of financial support
16 for the entity, with sufficient detail to disclose any relationships that
17 could reasonably be considered to present a potential conflict of
18 interest.

19 Sec. 4. Section 21-404, Revised Statutes Cumulative Supplement,
20 2014, is amended to read:

21 21-404 A benefit corporation shall be incorporated in accordance
22 with the Nebraska Model Business Corporation Act, but its articles of
23 incorporation must also state that it is a benefit corporation.

24 Sec. 5. Section 21-405, Revised Statutes Cumulative Supplement,
25 2014, is amended to read:

26 21-405 (1) An existing business corporation may become a benefit
27 corporation under the Nebraska Benefit Corporation Act by amending its
28 articles of incorporation so that they contain, in addition to the
29 requirements of section 21-220 ~~21-2018~~, a statement that the corporation
30 is a benefit corporation. In order to be effective, the amendment must be
31 adopted by at least the minimum status vote.

1 (2) An entity that is not a benefit corporation may become a benefit
2 corporation pursuant to subsection (1) of this section if the entity is
3 (a) a party to a merger or conversion or (b) an exchanging entity in a
4 share exchange, and the surviving, new, or resulting entity in the
5 merger, conversion, or share exchange is to be a benefit corporation. In
6 order to be effective, a plan of merger, conversion, or share exchange
7 subject to this subsection must be adopted by at least the minimum status
8 vote.

9 Sec. 6. Section 21-407, Revised Statutes Cumulative Supplement,
10 2014, is amended to read:

11 21-407 (1) A benefit corporation shall have a purpose of creating
12 general public benefit. This purpose is in addition to its purpose under
13 section 21-226 ~~21-2024~~.

14 (2) The articles of incorporation of a benefit corporation may
15 identify one or more specific public benefits that it is the purpose of
16 the benefit corporation to create in addition to its purposes under
17 section 21-226 ~~21-2024~~ and subsection (1) of this section. The
18 identification of a specific public benefit under this subsection does
19 not limit the purpose of a benefit corporation to create general public
20 benefit under subsection (1) of this section.

21 (3) The creation of general public benefit and specific public
22 benefit under subsections (1) and (2) of this section is in the best
23 interests of the benefit corporation.

24 (4) A benefit corporation may amend its articles of incorporation to
25 add, amend, or delete the identification of a specific public benefit
26 that it is the purpose of the benefit corporation to create. In order to
27 be effective, the amendment must be adopted by at least the minimum
28 status vote.

29 Sec. 7. Section 21-408, Revised Statutes Cumulative Supplement,
30 2014, is amended to read:

31 21-408 (1) In discharging the duties of their respective positions

1 and in considering the best interests of the benefit corporation, the
2 board of directors, committees of the board, and individual directors of
3 a benefit corporation:

4 (a) Shall consider the effects of any action or inaction upon:

5 (i) The shareholders of the benefit corporation;

6 (ii) The employees and work force of the benefit corporation, its
7 subsidiaries, and its suppliers;

8 (iii) The interests of customers as beneficiaries of the general
9 public benefit or specific public benefit purposes of the benefit
10 corporation;

11 (iv) Community and societal factors, including those of each
12 community in which offices or facilities of the benefit corporation, its
13 subsidiaries, or its suppliers are located;

14 (v) The local and global environment;

15 (vi) The short-term and long-term interests of the benefit
16 corporation, including benefits that may accrue to the benefit
17 corporation from its long-term plans and the possibility that these
18 interests may be best served by the continued independence of the benefit
19 corporation; and

20 (vii) The ability of the benefit corporation to accomplish its
21 general public benefit purpose and any specific public benefit purpose;

22 (b) May consider other pertinent factors or the interests of any
23 other group that they deem appropriate; and

24 (c) Need not give priority to the interests of a particular person
25 or group referred to in subdivision (a) or (b) of this subsection over
26 the interests of any other person or group unless the benefit corporation
27 has stated in its articles of incorporation its intention to give
28 priority to certain interests related to its accomplishment of its
29 general public benefit purpose or of a specific public benefit purpose
30 identified in its articles of incorporation.

31 (2) The consideration of interests and factors in the manner

1 required by subsection (1) of this section does not constitute a
2 violation of section 21-2,102 ~~21-2095~~.

3 (3) Except as provided in the articles of incorporation or bylaws, a
4 director is not personally liable for monetary damages for:

5 (a) Any action or inaction in the course of performing the duties of
6 a director under subsection (1) of this section if the director performed
7 the duties of office in compliance with section 21-2,102 ~~21-2095~~ and this
8 section; or

9 (b) Failure of the benefit corporation to pursue or create general
10 public benefit or specific public benefit.

11 (4) A director does not have a duty to a person that is a
12 beneficiary of the general public benefit purpose or a specific public
13 benefit purpose of a benefit corporation arising from the status of the
14 person as a beneficiary.

15 (5) A director who makes a business judgment in good faith fulfills
16 the duty under this section if the director:

17 (a) Is not interested in the subject of the business judgment;

18 (b) Is informed with respect to the subject of the business judgment
19 to the extent the director reasonably believes to be appropriate under
20 the circumstances; and

21 (c) Rationally believes that the business judgment is in the best
22 interests of the benefit corporation.

23 Sec. 8. Section 21-409, Revised Statutes Cumulative Supplement,
24 2014, is amended to read:

25 21-409 (1) The board of directors of a benefit corporation that is a
26 publicly traded corporation shall, and the board of any other benefit
27 corporation may, include a director, who:

28 (a) Shall be designated the benefit director; and

29 (b) Shall have, in addition to the powers, duties, rights, and
30 immunities of the other directors of the benefit corporation, the powers,
31 duties, rights, and immunities provided in this section.

1 (2) The benefit director shall be elected and may be removed in the
2 manner provided by the Nebraska Model Business Corporation Act. The
3 benefit director shall be an individual who is independent. The benefit
4 director may serve as the benefit officer at the same time as serving as
5 the benefit director. The articles of incorporation or bylaws of a
6 benefit corporation may prescribe additional qualifications of the
7 benefit director not inconsistent with this subsection.

8 (3) The benefit director shall prepare, and the benefit corporation
9 shall include in the annual benefit report to shareholders required by
10 section 21-413, the opinion of the benefit director on all of the
11 following:

12 (a) Whether the benefit corporation acted in accordance with its
13 general public benefit purpose and any specific public benefit purpose in
14 all material respects during the period covered by the benefit report;

15 (b) Whether the directors and officers complied with subsection (1)
16 of section 21-408 and subsection (1) of section 21-410, respectively; and

17 (c) If, in the opinion of the benefit director, the benefit
18 corporation or its directors or officers failed to act or comply in the
19 manner described in subdivisions (3)(a) and (b) of this subsection, a
20 description of the ways in which the benefit corporation or its directors
21 or officers failed to act or comply.

22 (4) The action or inaction of an individual in the capacity of a
23 benefit director constitutes for all purposes an action or inaction of
24 that individual in the capacity of a director of the benefit corporation.

25 (5) Regardless of whether the articles of incorporation or bylaws of
26 a benefit corporation include a provision eliminating or limiting the
27 personal liability of directors authorized by section 21-220 ~~21-2018~~, a
28 benefit director is not personally liable for an act or omission in the
29 capacity of a benefit director unless the act or omission constitutes
30 self-dealing, willful misconduct, or a knowing violation of law.

31 Sec. 9. Section 21-410, Revised Statutes Cumulative Supplement,

1 2014, is amended to read:

2 21-410 (1) Each officer of a benefit corporation shall consider the
3 interests and factors described in subsection (1) of section 21-408 in
4 the manner provided in that subsection if:

5 (a) The officer has discretion to act with respect to a matter; and

6 (b) It reasonably appears to the officer that the matter may have a
7 material effect on the creation by the benefit corporation of general
8 public benefit or a specific public benefit identified in the articles of
9 incorporation of the benefit corporation.

10 (2) The consideration of interests and factors in the manner
11 described in subsection (1) of this section does not constitute a
12 violation of section 21-2,107 ~~21-2099~~.

13 (3) Except as provided in the articles of incorporation or bylaws,
14 an officer is not personally liable for monetary damages for:

15 (a) An action or inaction as an officer in the course of performing
16 the duties of an officer under subsection (1) of this section if the
17 officer performed the duties of the position in compliance with section
18 21-2,107 ~~21-2099~~ and this section; or

19 (b) Failure of the benefit corporation to pursue or create general
20 public benefit or specific public benefit.

21 (4) An officer does not have a duty to a person that is a
22 beneficiary of the general public benefit purpose or a specific public
23 benefit purpose of a benefit corporation arising from the status of the
24 person as a beneficiary.

25 (5) An officer who makes a business judgment in good faith fulfills
26 the duty under this section if the officer:

27 (a) Is not interested in the subject of the business judgment;

28 (b) Is informed with respect to the subject of the business judgment
29 to the extent the officer reasonably believes to be appropriate under the
30 circumstances; and

31 (c) Rationally believes that the business judgment is in the best

1 interests of the benefit corporation.

2 Sec. 10. Section 21-412, Revised Statutes Cumulative Supplement,
3 2014, is amended to read:

4 21-412 (1)(a) Except in a benefit enforcement proceeding, no person
5 may bring an action or assert a claim against a benefit corporation or
6 its directors or officers with respect to:

7 (i) Failure to pursue or create general public benefit or a specific
8 public benefit set forth in its articles of incorporation; or

9 (ii) Violation of an obligation, duty, or standard of conduct under
10 the Nebraska Benefit Corporation Act.

11 (b) A benefit corporation is not liable for monetary damages under
12 the act for any failure of the benefit corporation to pursue or create
13 general public benefit or a specific public benefit.

14 (2) A benefit enforcement proceeding may be commenced or maintained
15 only:

16 (a) Directly by the benefit corporation; or

17 (b) Derivatively in accordance with the Nebraska Model Business
18 Corporation Act by:

19 (i) A person or group of persons that owned beneficially or of
20 record at least two percent of the total number of shares of a class or
21 series outstanding at the time of the act or omission complained of;

22 (ii) A director;

23 (iii) A person or group of persons that owned beneficially or of
24 record five percent or more of the outstanding equity interests in an
25 entity of which the benefit corporation is a subsidiary at the time of
26 the act or omission complained of; or

27 (iv) Other persons as specified in the articles of incorporation or
28 bylaws of the benefit corporation.

29 (3) For purposes of this section, a person is the beneficial owner
30 of shares or equity interests if the shares or equity interests are held
31 in a voting trust or by a nominee on behalf of the beneficial owner.

1 Sec. 11. Section 21-414, Revised Statutes Cumulative Supplement,
2 2014, is amended to read:

3 21-414 (1) A benefit corporation shall send its annual benefit
4 report to each shareholder:

5 (a) Within one hundred twenty days following the end of the fiscal
6 year of the benefit corporation; or

7 (b) At the same time that the benefit corporation delivers any other
8 annual report to its shareholders.

9 (2) A benefit corporation shall post all of its benefit reports on
10 the public portion of its Internet web site, if any, except that the
11 compensation paid to directors and financial or proprietary information
12 included in the benefit reports may be omitted from the benefit reports
13 as posted.

14 (3) If a benefit corporation does not have an Internet web site, the
15 benefit corporation shall provide a copy of its most recent benefit
16 report, without charge, to any person that requests a copy, except that
17 the compensation paid to directors and financial or proprietary
18 information included in the benefit report may be omitted from the copy
19 of the benefit report provided.

20 (4)(a) Concurrently with the delivery of the benefit report to
21 shareholders under subsection (1) of this section, the benefit
22 corporation shall deliver a copy of the benefit report to the Secretary
23 of State for filing, except that the compensation paid to directors and
24 financial or proprietary information included in the benefit report may
25 be omitted from the benefit report as delivered to the Secretary of
26 State.

27 (b) The Secretary of State shall charge a fee in the amount
28 prescribed in subdivision (a)(30) of section 21-205 ~~(1)(y) of section~~
29 ~~21-2005~~ for filing a benefit report. The fee shall be remitted to the
30 State Treasurer for credit to the Corporation Cash Fund.

31 Sec. 12. Section 70-1903, Revised Statutes Cumulative Supplement,

1 2014, is amended to read:

2 70-1903 For purposes of the Rural Community-Based Energy Development
3 Act:

4 (1) C-BED project or community-based energy development project
5 means a new energy generation project using wind, solar, biomass, or
6 landfill gas as the fuel source that:

7 (a) Has at least twenty-five percent of the gross power purchase
8 agreement payments flowing to the qualified owner or owners or as
9 payments to the local community; and

10 (b) Has a resolution of support adopted:

11 (i) By the county board of each county in which the C-BED project is
12 to be located; or

13 (ii) By the tribal council for a C-BED project located within the
14 boundaries of an Indian reservation;

15 (2) Electric utility means an electric supplier that:

16 (a) Owns more than one hundred miles of one-hundred-fifteen-kilovolt
17 or larger transmission lines in the State of Nebraska;

18 (b) Owns more than two hundred megawatts of electric generating
19 facilities; and

20 (c) Has the obligation to directly serve more than two hundred
21 megawatts of wholesale or retail electric load in the State of Nebraska;

22 (3) Gross power purchase agreement payments means the total amount
23 of payments during the first twenty years of the agreement;

24 (4) Payments to the local community include, but are not limited to:

25 (a) Lease and easement payments to property owners made as part of a
26 C-BED project;

27 (b) Contract payments for concrete, steel, gravel, towers, turbines,
28 blades, wire, or engineering, procurement, construction, geotechnical,
29 environmental, meteorological, or legal services or payments for other
30 components, equipment, materials, or services that are necessary to
31 permit or construct the C-BED project and that are provided by a company

1 that has been organized or incorporated in Nebraska under Nebraska law
2 and has employed at least five Nebraska residents for at least eighteen
3 months prior to the date of the project application for certification as
4 a C-BED project; and

5 (c) Payments that are for physical parts, materials, or components
6 that are manufactured, assembled, or fabricated in Nebraska and that are
7 not described in subdivision (a) or (b) of this subdivision.

8 Such payments need not be made directly from power purchase
9 agreement revenue and may be made from other funds in advance of
10 receiving power purchase agreement revenue; and

11 (5) Qualified owner means:

12 (a) A Nebraska resident;

13 (b) A limited liability company that is organized under the Nebraska
14 Uniform Limited Liability Company Act and that is made up of members who
15 are Nebraska residents;

16 (c) A Nebraska nonprofit corporation organized under the Nebraska
17 Nonprofit Corporation Act;

18 (d) An electric supplier as defined in section 70-1001.01, except
19 that ownership in a single C-BED project is limited to no more than:

20 (i) Fifteen percent either directly or indirectly by a single
21 electric supplier; and

22 (ii) A combined total of twenty-five percent ownership either
23 directly or indirectly by multiple electric suppliers;

24 (e) A tribal council;

25 (f) A domestic corporation organized in Nebraska under the Nebraska
26 Model Business Corporation Act and domiciled in Nebraska; or

27 (g) A cooperative corporation organized under sections 21-1301 to
28 21-1306 and domiciled in Nebraska.

29 Sec. 13. This act becomes operative on January 1, 2017.

30 Sec. 14. Original Laws 2014, LB749, section 295; and sections
31 21-402, 21-403, 21-404, 21-405, 21-407, 21-408, 21-409, 21-410, 21-412,

1 21-414, and 70-1903, Revised Statutes Cumulative Supplement, 2014, are
2 repealed.